Court File No.: CV-17-11846-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., 9845488 CANADA INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC. AND
3339611 CANADA INC.

APPLICANTS

**REDACTED FACTUM OF THE MONITOR**
**(Motion Returnable MAY 7, 2019)**

May 2, 2019

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**PART I - INTRODUCTION**

1. The Monitor entered into a settlement agreement ("**Settlement Agreement**") with various of Sears Canada's landlords that were represented by Blaney McMurtry LLP ("**Blaney McMurtry**") – specifically Bentall Kennedy (Canada) LP, QuadReal Property Group, Primaris Management Inc., Westcliff Management Ltd., Tanurb (Festival Marketplace) Inc., and Cogir Real Estate (collectively, the "**Disputing Landlords**").

2. The Settlement Agreement relates to properties formerly occupied by Sears Canada, or otherwise affected by these CCAA proceedings, and the amounts owing to the Disputing Landlords in respect of these properties.

3. The Settlement Agreement contains a "Landlord Claim Formula", which, in turn, determines the quantum of the settlement. Specifically, that quantum is based upon the contractually defined term "Rent", which was to be determined from the "the Proofs of Claims filed by the Landlords, or if no Rent was detailed in the Proofs of Claims, as evidenced by the books and records of the Company".

4. For 15 of the 22 Blaney Claims, the Monitor calculated Rent based upon the Disputing Landlord's own Proofs of Claims. At no time prior to execution of the Settlement Agreement were these Proofs of Claims or the calculations therein modified; nor did the Disputing Landlords advise that they would seek to deviate from the amounts set out in the Proofs of Claims.

5. For the remaining 7, there was no detail of Rent in the Proofs of Claims. Accordingly, Sears Canada calculated Rent based upon its own books and records.

6. The Monitor also provided a summary sheet in advance of the Settlement Agreement being executed, showing the calculation of Rent to the Disputing Landlords based upon (i) the Proofs of Claims, where applicable; and (ii) otherwise, the books and records. The Disputing Landlords at no time took issue either with the approach or the calculations prior to execution of the Settlement Agreement.

7. It was only afterwards that the Disputing Landlords challenged this calculation of Rent, and tried to recalculate Rent based upon extrinsic information, including their own records, that neither stemmed from the Proofs of Claims nor Sears Canada's books and records.

8. The Monitor seeks enforcement of the Settlement Agreement in accordance with its express terms.

9. The Settlement Agreement, and in particular, the calculation of Rent, is clear and unambiguous. The meaning of the agreement can be readily determined on the existing record and indeed on the face of the contract alone. The Settlement Agreement can and should be enforced on the basis of the current record.

10. Finally, there is an unrelated issue relating to a mistaken payment made by Sears Canada to one of the Disputing Landlords. Blaney McMurtry improperly withheld $10,000 in reimbursing the mistaken payment, allegedly to account for its legal costs on a substantial indemnity basis. There is no basis in law for an unjustly enriched party to withhold a portion of that unjust enrichment to pay its own legal fees. The $10,000 must be repaid.

## PART II - THE FACTS

### A. Joinder Agreement and Term Sheet

11. During October and November 2018, Blaney McMurtry and counsel for the Monitor engaged in numerous discussions in an attempt to resolve 22 Landlord Claims advanced by the Disputing Landlords (the "**Blaney Claims**").[1]

12. As part of those negotiations, Blaney McMurtry requested that counsel to the Monitor provide them with the terms of settlement achieved with the other Landlords.[2]

13. In particular, all Landlords with Landlord Claims agreed to (i) a Landlord Claim Formula Term Sheet dated July 26, 2018 (the "**Term Sheet**"), (ii) a joinder agreement attached to the Term Sheet, and which incorporated the terms of the Term Sheet by reference (the "**Joinder Agreement**").[3]

14. The Joinder Agreement, together with the Term Sheet, outlined the following formula for calculating certain types of Landlord Claims:

**[REDACTED]**.[4]

15. In accordance with the foregoing, the Landlord Claim Formula was to be calculated based upon the defined term "Rent", which, in turn, was defined as:

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[1] Thirtieth Report of the Monitor dated March 25, 2019 (the (**Thirtieth Report**") at para 29.

[2] Appendix "A" to the Thirtieth Report, p A-1.

[3] Thirtieth Report at para 18. Copies of these documents are included at Appendix A to the Thirtieth Report.

[4] Thirtieth Report at para 21; Appendix A to the Thirtieth Report.

> collectively, [**REDACTED**] in accordance with the applicable Lease and as detailed in the Proofs of Claims filed by the Landlords, or if no Rent was detailed in the Proofs of Claims, as evidenced by the books and records of the Company.[5]

16. As such, the "Rent" was to be determined either:

(a) "as detailed in the Proofs of Claims filed by the Landlords"; or

(b) "if no Rent was detailed in the Proofs of Claims, as evidenced by the books and records of" Sears Canada.

17. This approach allowed Sears Canada and the Landlords not only to have a methodology for the calculation of the claims, but also a methodology to determine the input for that calculation – namely, Rent.

## B. The Settlement Agreement

18. On October 22, 2018, counsel for the Monitor wrote to Blaney McMurtry and attached the draft Term Sheet and Joinder Agreement that the other Landlords had signed. The next day, the Monitor proposed that the Blaney Claims should be settled in accordance with these terms.[6]

19. On October 24, 2018, Blaney McMurtry responded, specifically requesting the monetary value of each of the 22 Blaney Claims under the Landlord Claim Formula in the Term Sheet. Blaney McMurtry identified the requested information as "the value of the claims which would be allowed under the formula", and advised that it would be "very helpful to have that analysis to provide to the clients as they consider next steps".[7]

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[5] Thirtieth Report at para 22; Appendix A to the Thirtieth Report.

[6] Thirtieth Report at para 30; Appendix B to the Thirtieth Report.

[7] Thirtieth Report at para 31; Appendix B to the Thirtieth Report.

20. Counsel for the Monitor responded to Blaney McMurtry later that day attaching a spreadsheet (the "**Spreadsheet**") which listed for each of the 22 Blaney Claims (i) the amount claimed in the corresponding Proof of Claim (whether for Rent or otherwise), and (ii) the amount recoverable for the claim under the Landlord Claim Formula in the Term Sheet.[8]

21. The Spreadsheet listed a total value for all 22 of the Blaney Claims under the Landlord Claim Formula calculated using Sears Canada's books and records as **[REDACTED]**.[9]

22. Of the 22 Blaney Claims, 15 had provided a detailed breakdown of Rent. For each of these 15, the Monitor used the Rent amounts provided by the Disputing Landlords in their Proofs of Claims. For the remaining 7 Disputing Landlords, no details of Rent were provided. Accordingly, Sears Canada used its own books and records.[10]

23. Over the following weeks, counsel for the Monitor and Blaney McMurtry exchanged draft settlement agreements in respect of the Blaney Claims and met with Justice Morawetz in respect of the same.[11]

24. On November 15, 2018, Blaney McMurtry communicated with counsel for the Monitor by email. The email attached (i) the Term Sheet, (ii) Schedule "A" to the Term Sheet (defined

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[8] Thirtieth Report at paras 32-33; Appendix B to the Thirtieth Report.

[9] Thirtieth Report at para 33; Appendix B to the Thirtieth Report.

[10] See Appendix "C" to this factum comparing the Rent Claim per the Proofs of Claims and the Rent per the Monitor's Joinder Agreement and Spreadsheet. The Proof of Claim figures are drawn from the corresponding individual Proof of Claims in the Claims Officer Adjudication Record.

[11] Thirtieth Report at para 35; Appendix B to the Thirtieth Report.

terms), (iii) Schedule "B" to the Term Sheet (the Joinder Agreement), and (iv) Blaney McMurtry's revisions to a proposed settlement agreement in respect of the 22 Blaney Claims.[12]

25. Among other things, the settlement agreement attached to the November 15, 2018 Blaney McMurtry communication:

(a) Incorporated the Term Sheet and Joinder Agreement as schedules;

(b) Stated that all capitalized but undefined terms in the Settlement Agreement have the meaning ascribed to them in the Term Sheet;

(c) Stated that the Disputing Landlords:

(i) agree to the valuation of their Landlord Claims "in accordance with the Landlord Claim Formula set out in the Joinder Agreements"; and

(ii) agree to "deliver executed Joinder Agreements to the Monitor"; and

(d) Provided that the Landlord Claim Formula in the Term Sheet would be deemed by the Monitor and the Disputing Landlords to be modified by increasing the amounts explicitly listed therein by **[REDACTED]** each (the "**Revision**").[13]

26. On November 30, 2018, Blaney McMurtry sent to the Monitor an amended Settlement Agreement (the "**Amended Settlement Agreement**") with certain modifications in "track

[12] Thirtieth Report at para 36; Appendix D to the Thirtieth Report.

[13] Thirtieth Report at para 37; Appendix D to the Thirtieth Report.

changes". None of the changes made in the Amended Settlement Agreement modified the terms described above.[14]

27. Later that same day, Blaney McMurtry sent the Monitor an executed copy of the Amended Settlement Agreement (the "**Blaney Executed Agreement**"). The Blaney Executed Agreement did not modify the terms described above. The Blaney Executed Agreement was executed by "John C. Wolf" as "BLANEY MCMURTRY LLP, ON BEHALF OF THE MOVING LANDLORDS". The initials "JCW" appear on every page of the Blaney Executed Agreement.[15]

28. At no time prior to the provision of this Executed Agreement did Blaney McMurtry advise that they were seeking to challenge or modify the 7 Rent calculations based upon Sears Canada's books and records or the 15 Rent calculations based upon their own clients' Proofs of Claims.

29. On December 3, 2018, counsel for the Monitor provided Blaney McMurtry with:

(a) a copy of the Blaney Executed Agreement countersigned by the Monitor (the "**Final Executed Agreement**"); and

(b) Joinder Agreements for each of the 22 Blaney Claims (the "**Final Joinder Agreements**") listing the agreed settlement amounts calculated using:

(i) the Landlord Claim Formula in the Term Sheet;

(ii) Sears Canada's books and records and the Proofs of Claims, as applicable; and

[14] Thirtieth Report at para 39; Appendix E to the Thirtieth Report.

[15] Thirtieth Report at para 40; Appendix F to the Thirtieth Report.

(iii) the agreed Revision of **[REDACTED]** (collectively, the "**Final Amounts**").[16]

30. The Final Amounts listed in the Final Joinder Agreements totalled **[REDACTED]**, which is **[REDACTED]** greater than the total amount set out in respect of the Blaney Claims in the Spreadsheet provided to Blaney McMurtry on October 24, 2018, reflecting the agreed Revision of **[REDACTED]** per Blaney Claim.[17]

31. Later on December 3, 2018, the Monitor wrote to Justice Morawetz, who had been mediating the discussions between the Monitor and Blaney McMurtry in respect of the Blaney Claims, to inform His Honour that settlements were reached with the Disputing Landlords, and that Justice Hainey had been advised of the same. Blaney McMurtry was copied on this communication.[18]

32. Subsequently on December 3, 2018, Blaney McMurtry responded to the delivery of the Final Executed Agreement and Final Joinder Agreements (which included the Final Amounts) stating that it was confirming that "the matter is settled as per the executed agreement".[19]

### C. The Disputing Landlords Seek to Unilaterally Amend the Agreement

33. On December 10, 2018, Blaney McMurtry wrote to counsel for the Monitor purporting to attach "executed joinder agreements and covering letters of today's date". The December 10, 2018 email attached modified Joinder Agreements for all 22 Blaney Claims (the "**Modified**

[16] Thirtieth Report at para 41; Appendix G to the Thirtieth Report.

[17] Thirtieth Report at para 42; Appendix G to the Thirtieth Report.

[18] Thirtieth Report at para 44; Appendix H to the Thirtieth Report..

[19] Thirtieth Report at para 45; Appendix I to the Thirtieth Report.

**Joinder Agreements**"). In the covering letters accompanying the Modified Joinder Agreements, Blaney McMurtry stated that it had reviewed the Final Amounts in the Final Joinder Agreements that had earlier been delivered by the Monitor and had determined to revise same based upon their own records and calculations of lost future rent.[20]

34. Increases and modifications were made not only to the 7 claims that were based upon Sears Canada's records, but also the 15 claims that were based upon the Disputing Landlord's own Proofs of Claims.

35. The covering letter further asserted that "By signing the attached Joinder Agreements, you also agree that the Monitor has no further claims for any post-filing sums against this Landlord".[21] No such term was included in the Settlement Agreement.

36. The amounts listed in the Modified Joinder Agreements by Blaney McMurtry, totaling **[REDACTED]**, were higher than the total value of the Final Amounts set out in the Final Joinder Agreements by approximately $18,479,807.[22]

37. On December 14, 2018, counsel for the Monitor wrote to Blaney McMurtry with respect to the Modified Joinder Agreements. Among other things, the Monitor stated that:

(a) The Final Amounts in the Final Joinder Agreements were agreed in the Final Executed Agreement and had been the basis of negotiations over the past 9 months;

[20] Thirtieth Report at para 46; Appendix J to the Thirtieth Report.

[21] Appendix J to the Thirtieth Report.

[22] Thirtieth Report at para 47; Appendix J to the Thirtieth Report.

(b) Blaney McMurtry had impermissibly altered the agreed upon Final Amounts in the Final Joinder Agreements; and

(c) Blaney McMurtry's proposed amendments were directly contradictory to the terms of the Final Executed Agreement, which was binding on the Disputing Landlords.[23]

38. On December 18, 2018, Blaney McMurtry wrote to counsel for the Monitor that (i) "[w]e disagree completely that there was ever a discussion, never mind an agreement, as to the precise value of our client claims under the formula", (ii) "[t]here is nothing in the settlement which requires us to accept the Monitor's calculation", and (iii) "[t]he settlement agreement is an agreement to accept that the formula will determine our clients claims".[24]

39. Blaney McMurtry did not address and made no mention of the fact that for 15 of the 22 claims, the amounts at issue were in fact their own calculations and not those of the Monitor.

**D. The Mistaken Payment**

40. In October 2017, Sears Canada made a payment in error in the amount of $418,698.50 to Primaris Management Inc. ("**Primaris**"), one of the Disputing Landlords, which was to be returned to Sears Canada (the "**Mistaken Payment**"). The Mistaken Payment was not tied to any amount owing to Primaris.[25]

[23] Thirtieth Report at para 49; Appendix K to the Thirtieth Report.

[24] Thirtieth Report at para 51; Appendix L to the Thirtieth Report.

[25] Thirtieth Report at para 55.

41. On May 9, May 22 and October 24, 2018, the Monitor wrote to Blaney McMurtry in respect of the return of the Mistaken Payment, which was to be reconciled against amounts owing to the Disputing Landlord.[26]

42. Pursuant to Section 4 of the Settlement Agreement, the parties agreed that the "applicable Moving Landlords will work with the Monitor in good faith and due diligence to reconcile, by no later than December 10, 2018, amounts which the SCI claims the Moving Landlords owe, on a post-filing basis, in respect of … Orchard Park Shopping Centre ($406,944.34)".[27]

43. On December 10, 2018, Blaney McMurtry wrote to counsel for the Monitor stating that the amount owing to Sears Canada in respect of the Mistaken Payment should be reduced by "our reasonable substantial indemnity costs of addressing these matters", valued at "$8,850 plus hst for costs".[28]

44. On December 17, 2018, counsel for the Monitor communicated to Blaney McMurtry that $10,000 for legal fees should not be deducted from the amount owing in respect of the Mistaken Payment because the Monitor had not agreed to pay the legal fees of any other landlord for similar work in connection with other mistaken payments. The Monitor requested payment of $291,116.12, which represented the reconciliation of the Mistaken Payment with amounts to be

[26] Thirtieth Report at para 56; Appendix O to the Thirtieth Report.

[27] Thirtieth Report at para 57; Appendix G to the Thirtieth Report.

[28] Thirtieth Report at para 58; Appendix P to the Thirtieth Report.

paid to the Disputing Landlord without a deduction for legal fees, by no later than December 21, 2018.[29]

45. On January 7, 2019, Blaney McMurtry wrote to counsel for the Monitor, stating that "[i]n general, the Monitor/Sears accounting has not exhibited the kind of consistency our clients require in order to settle the matter just on the basis of" the Monitor's letter of December 17, 2018.[30]

46. On January 11, 2019, counsel for the Monitor wrote to Blaney McMurtry confirming that the amount outstanding in respect of the Mistaken Payment was as stated in the Monitor's letter of December 17, 2018, and requested payment by no later than January 18, 2019.[31]

47. On February 19, 2019, Blaney McMurtry wrote to counsel for the Monitor enclosing a cheque in the amount of $281,116.12. Blaney McMurtry stated that (i) the amount of the cheque was the amount requested by the Monitor "minus $10,000" and (ii) if the Monitor deposited the cheque, Blaney McMurtry would "take this to represent a definitive determination by the Monitor that there are no further amounts owing".[32]

48. On March 8, 2019, counsel for the Monitor wrote to Blaney McMurtry stating that the Monitor had (i) cashed the cheque provided and (ii) was considering bringing a motion to obtain

[29] Thirtieth Report at para 59; Appendix Q to the Thirtieth Report.

[30] Thirtieth Report at para 60; Appendix R to the Thirtieth Report.

[31] Thirtieth Report at para 61; Appendix S to the Thirtieth Report.

[32] Thirtieth Report at para 62; Appendix T to the Thirtieth Report.

the Court's direction with respect to the unilateral deduction of $10,000 on account of legal fees.[33]

## PART III - ISSUES

49. There are two fundamental issues at dispute regarding the Settlement Agreement: (i) the proper procedure and evidentiary basis to resolve the parties' dispute; and (ii) the proper interpretation of the Settlement Agreement, and specifically the calculation of Rent thereunder.

50. The final issue is whether Sears Canada is entitled to keep the payment of $281,116.12 received from Primaris in respect of the Mistaken Payment and recover the shortfall of $10,000.

## PART IV - ANALYSIS

### A. Proper Procedure and Evidentiary Basis

51. In *Slater Steel Inc., Re*, Justice Pepall specifically noted that the enforcement of CCAA settlement agreements should occur by way of motion in the context of that proceeding and through a summary determination if "the issues in dispute may properly be determined without a trial":

> the interpretation and enforcement of Minutes of Settlement entered into within a CCAA proceeding are properly within the jurisdiction and purview of a motions judge sitting on the Commercial List. If the court is in a position to effectively dispose of the issue, it should do so. Summary determinations of disputes are desirable in that they save time and expense. The Rules of Civil Procedure are consistent with such an approach. … By analogy to this case, Rule 49.09 provides that where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may move for judgment. It seems to me that the enforcement of Minutes of Settlement should similarly be enforceable by motion in the proceeding rather than requiring a party to institute fresh proceedings. … That said, there must be both procedural and substantive

[33] Thirtieth Report at para 63; Appendix U to the Thirtieth Report.

> fairness associated with such a determination. In this case, I must be satisfied that the issues in dispute may properly be determined without a trial.[34]

52. This reflects the general approach applied under Rule 49.09 for the enforcement of settlements. The Courts have held that the test to be applied is the same as under Rule 20: there must be no genuine issue requiring a trial.[35]

53. This standard is met when the judge "is able to reach a fair and just determination on the merits …. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."[36]

54. The Settlement Agreement is reduced to writing. As set out below, the dispute over the agreement is narrow – relating to the defined term "Rent" and its method of calculation. The Monitor's position on this point is simple: the calculation must be done exactly in accordance with the terms of the Settlement Agreement – specifically that where Rent is detailed in the Proofs of Claim, that amount governs, and where Rent was not detailed, it must be calculated in accordance with the books and records of Sears Canada – which, in any event, is in accordance with the numbers disclosed by the Monitor in the Spreadsheet in advance of execution of the Settlement Agreement.

55. The Disputing Landlords have alleged that the motion cannot proceed at this time, seeking instead (i) declaration that counsel to the Monitor cannot continue to act in respect of

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[34] *Slater Steel Inc., Re*, 2009 CarswellOnt 3122 at para 72.

[35] *Bayerische Landesbank Girozentrale v. R.S.W.H. Vegetable Farms Inc.*, 2001 CarswellOnt 615 at paras 4 -7.

[36] *Hryniak v. Mauldin*, 2014 SCC 7 at para 49.

any dispute as to the enforceability of the Settlement Agreement; and (ii) case management and a litigation schedule.

56. Neither of these demands have any merit – the motion to interpret the settlement can and should proceed now and on the basis of the current record with current counsel of record.

57. In their Notice of Motion, the Disputing Landlords allege:

(a) "To the extent that the Monitor wishes to dispute what was agreed to with the Landlords in the terms of the Settlement Agreement, Blaneys will be conflicted from representing the Landlords as it will be a witness required to speak to what was negotiated and agreed to between the parties";

(b) "Norton Rose would also be conflicted out from representing the Monitor as it will be a witness required to speak to what was negotiated and agreed to between the parties"; and

(c) "any dispute in respect of the enforceability of the Settlement Agreement will require evidence not only of what the documents do or do not say, but of the entire factual matrix as to why the documents were prepared in the manner in which they were prepared and what the parties reasonably expected or intended in entering into the Settlement Agreement".

58. This position fundamentally misconstrues the law regarding the interpretation of contracts, improperly seeking to have a determination made upon the subjective intention of the parties and their counsel rather than the objective terms of the Settlement Agreement itself.

59. The Court of Appeal has expressly warned against precisely the sort of interpretive and evidentiary approach sought by the respondents. In interpreting a contract, "the court aims to determine the intentions of the parties in accordance with the language used in the written document".[37] Although the "factual matrix" is relevant in interpreting a contract, a court "must have regard to the objective evidence of the 'factual matrix' or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties".[38]

60. Indeed, as held by the Supreme Court of Canada, the "surrounding circumstances … are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting". It expressly excludes "subjective intentions".[39]

61. Both the Settlement Agreement itself as well as the surrounding circumstances of the communication between counsel is set out in writing, and has been included in the Monitor's Report. This written evidence is the sole basis by which the Settlement Agreement must be interpreted.[40]

62. Therefore, there is no need for counsel to "be a witness required to speak to what was negotiated and agreed to between the parties". Such evidence would be wholly irrelevant and impermissible evidence of subjective intention. What was negotiated and agreed to between the parties is established by the objective terms of the contract, not by what counsel thought about those terms or even may have meant by those terms.

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[37] *Salah v. Timothy's Coffees of the World Inc.,* 2010 ONCA 673 at para 16 [***Salah***].

[38] *Salah*, *supra* at para 16 [emphasis added]; see *also RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA 648 at para 45.

[39] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras 59-60.

[40] *Olivieri v. Sherman*, 2007 ONCA 491 at paras. 44-45.

63. Similarly, questions of "why the documents were prepared in the manner in which they were prepared and what the parties reasonably expected or intended in entering into the Settlement Agreement" relates to the subjective intention of the parties or the counsel in negotiating and agreeing to the Settlement Agreement. It is irrelevant.

64. The irrelevance and inadmissibility of subjective intentions is likely the reason why no reported decision has held that counsel is disqualified from acting on a Rule 49.09 motion to enforce a settlement, despite counsel routinely being involved in drafting or negotiating such settlements. It appears common for counsel to continue to act on a motion to enforce a settlement despite counsel having both negotiated the agreement. By way of example only:

(a) The case of *Catanzaro v. Kellogg's Canada Inc.*[41] addressed a Rule 49.09 motion. The Defendant, who was seeking enforcement of the settlement, was represented by one "Mr. White" throughout the action and in the enforcement motion. Notably, the evidence relied upon by the motion judge involved correspondence and communications from and to Mr. White. Neither the motion judge nor the Court of Appeal identified any impropriety in Mr. White continuing to act on the Rule 49.09 motion; and

(b) In *Gregory v Gill*, counsel to the parties continued to act on the Rule 49.09 motion. The evidence considered by the motion judge included "much back and forth correspondence between counsel as regards the mutual release following settlement of the application".[42]

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[41] *Catanzaro v. Kellogg's Canada Inc.*, 2014 ONSC 5691 at para 6, aff'd 2015 ONCA 779.

[42] *Gregory v. Gill*, 2016 ONSC 4227 at para 12.

65. Accordingly, there is no basis for either of Norton Rose or Blaney McMurtry to testify, nor is there any basis to disqualify counsel from acting on a motion to enforce the settlement.

**B. The Interpretation of the Settlement Agreement**

66. The dispute on this motion is what was agreed to when the parties agreed upon the "Landlord Claim Formula", and specifically whether there was agreement on the quantum of "Rent" as incorporated into that formula, which ultimately determines the amount calculated under the Landlord Claim Formula.

67. It is the Monitor's position that the quantum of Rent is a defined term in the Landlord Claim Formula and that the quantum of Rent for each of the Disputing Landlords must be calculated in accordance with that defined term.

68. In contrast, the Disputing Landlords have alleged that although the parties agreed to the Landlord Claim Formula in principle, there has been no agreement on the fundamental underlying quantum of Rent. In effect, they appear to assert that the Settlement Agreement is an "agreement to agree", leaving open a dispute between the parties on the central issue of the settlement: its quantum.

69. There can be no dispute that the Disputing Landlords agreed to the Landlord Claims Formula. Section 2 of the Settlement Agreement expressly provides that the "Moving Landlords agree to the valuation of their Landlord Claims in accordance with the Landlord Claim Formula set out in the Joinder Agreements and to deliver executed Joinder Agreements to the Monitor …".

70. The Landlord Claims Formula incorporates the defined term "Rent", which is specifically defined in the Term Sheet as:

> collectively [**REDACTED**] in accordance with the applicable Lease and as detailed in the Proofs of Claims filed by the Landlords, or if no Rent was detailed in the Proofs of Claims, as evidenced by the books and records of the Company. [emphasis added]

71. This definition of Rent specifically identifies two and only two sources for the calculation of Rent, and assigns them a priority: (i) the Proof of Claim, if it provides detail of Rent; and (ii) otherwise, the books and records of the Company. It binds both parties to a knowable and ascertainable Rent calculation, and prevents them from using other, extrinsic sources of information to dispute the calculation.

72. In accordance with this definition, the parties are required first to look to the Proofs of Claim to determine whether Rent was detailed therein. There are twenty-two relevant Proofs of Claim for the purpose of this motion, each of which is included in the Claims Officer Adjudication Record.

73. Of these 22, 15 Proofs of Claims contained detailed information on Rent. Accordingly, the amounts set forward by the Monitor, both initially in the Spreadsheet prior to execution of the Settlement Agreement, and subsequently in the Joinder Agreements, for each of these 15 Disputing Landlords were based on their own figures as asserted in their own Proofs of Claim.

74. The Disputing Landlords are effectively taking the position that they are entitled to unilaterally increase their own figures after the execution of the Settlement Agreement to provide for a higher settlement payment, despite the Settlement Agreement expressly providing that the Proof of Claims figures govern.

75. The remaining 7 Proofs of Claim made bald allegations comprised solely of a claim amount, and rolled in claims for other issues over and above Rent. They accordingly failed to provide any detail on Rent.

76. As a result, in accordance with the terms of the Settlement Agreement the Company's books and records becomes the source for the calculation of Rent.

77. The figures for Rent, as calculated in accordance with the Settlement Agreement, were in fact provided to the Disputing Landlords in advance of execution of the Settlement Agreement, in the form of the Spreadsheet.

78. Notably, the Disputing Landlords did not challenge these calculations or take the position that they could provide further, new, or amended amounts until after the execution of the Settlement Agreement. It was only then that they derived completely independent calculations of rent, ostensibly on the basis of their own records, and unilaterally entered these amounts into the Joinder Agreements.

79. The Monitor's position is therefore that:

(a) For the 15 Claims for which there are details of Rent in the Proofs of Claims, these are based on the Proofs of Claim;

(b) For the 7 Claims for which there are no details of Rent, these are based on Sears Canada's books and records; and

(c) For all 22, these amounts were set out by the Monitor in the Spreadsheet provided to the Disputing Landlords in advance of the Settlement.

80. The Monitor's position is "in accordance with the language used in the written document", in a manner that "gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective".[43] Simply put, there is a contractual definition

[43] *Salah*, *supra* at para 16

of Rent. It is this contractual definition upon which the Monitor seeks to rely. In contrast, the Disputing Landlords seek to unambiguously depart from the contractual definition of Rent by relying upon sources of information other than the Proofs of Claim and the Company's books and records to calculate Rent.

81. The Monitor's position is consistent with the "'factual matrix' or context underlying the negotiation of the contract",[44] in circumstances where the Monitor specifically provided the Rent calculations in advance of the settlement agreement and where for 15 out of 22 of the Claims, the amounts were based upon the information submitted by the Disputing Landlords.

82. Finally, the Monitor's position "accord[s] with sound commercial principles and good business sense, and avoid[s] commercial absurdity".[45] The quantum of the settlement is a fundamental term of any settlement agreement. Under the Monitor's interpretation, this amount was both known, calculable, and indeed disclosed in advance.

83. Under the Disputing Landlord's interpretation, the parties failed to agree to this essential term in advance. If the Disputing Landlords are entitled to calculate Rent based upon their own internal records and amounts not detailed in the Proofs of Claims, the corollary is that this essential term would have been unknowable for Sears Canada at the time of executing the Settlement Agreement.

### C. The Mistaken Payment

84. The final issue relates to the Mistaken Payment. Although this issue was incorporated into the Settlement Agreement, including an obligation to "work in good faith and with due

[44] *Ibid* at par 16.

[45] *Ibid* at para 16.

diligence to reconcile" the amount repayable to Sears Canada, the basis for the repayment fundamentally lies in unjust enrichment: Sears Canada was deprived of the amount of $291,116.12, Primaris was enriched in a corresponding amount, and there was no juristic reason for the deprivation and corresponding enrichment.[46]

85. The return of the $291,116.12 owed in respect of the Mistaken Payment was a straightforward accounting matter for which no negotiation or legal analysis was required. There was no basis for a deduction in the amount of $10,000 in legal fees. Indeed, the courts have never recognized that a party being pursued for unjust enrichment is entitled to their own legal costs for responding to that demand.

86. Accordingly, the $291,116.12 was unambiguously owing to Sears Canada. The Monitor made this clear and advised that no deduction in respect of legal fees would be provided.

87. When $281,116.12 of the Mistaken Payment was provided by cheque to the Monitor and Sears Canada, they were entitled to cash that cheque as it represented money that was owing to Sears Canada.

88. The cashing of a cheque for a lesser amount cannot be taken as accord and satisfaction of the full amount owing to Sears Canada even when the cheque is accompanied by a unilateral statement to that effect in the covering letter or on the cheque itself. In *Champlain Ready-Mixed Concrete v. Beaupre*,[47] the Court of Appeal held that a creditor who had cashed a cheque that had been provided expressly on terms that it was for "payment in full" was entitled to both cash the cheque and recover the shortfall in payment. The Court of Appeal went on to say that a

[46] *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 30.

[47] *Champlain Ready-Mixed Concrete v. Beaupre*, 1971 CarswellOnt 790 (CA).

debtor who seeks to establish accord and satisfaction has a “heavy onus” to prove “an express acceptance of part performance”.[48]

89. There is no evidence of such an acceptance in this case. Indeed, the Monitor had already disputed the deduction of legal fees proposed by the landlord and had not indicated any change of position. Accordingly, an additional $10,000 is owing to Sears Canada from Primaris and the Monitor seeks payment of same.

**PART V - ORDER REQUESTED**

90. The Monitor requests that this Court Order:

(a) Enforcing the terms of settlement outlined in the Settlement Agreement;

(b) Declaring the total value for all 22 of the Blaney Claims under the Landlord Claim Formula is **[REDACTED]**;

(c) Declaring that the value for each of the Blaney Claims is as set out in Appendix “C” to this factum;

(d) An order for the payment of $10,000 by Primaris Management Inc. to Sears Canada and

(e) Costs of this motion on a substantial indemnity basis.

[48] *Ibid* at para 8.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this May 2, 2019.

Alan Merskey
Norton Rose Fulbright Canada LLP

Lawyers for the Monitor, FTI Consulting Canada Inc.

**SCHEDULE "A"**
**LIST OF AUTHORITIES**

| | |
|---|---|
| 1 | *Slater Steel Inc., Re*, 2009 CarswellOnt 3122 |
| 2 | *Bayerische Landesbank Girozentrale v. R.S.W.H. Vegetable Farms Inc.*, 2001 CarswellOnt 615 |
| 3 | *Hryniak v. Mauldin*, 2014 SCC 7 |
| 4 | *Salah v. Timothy's Coffees of the World Inc.,* 2010 ONCA 673 |
| 5 | *RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA 648 |
| 6 | *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 |
| 7 | *Olivieri v. Sherman*, 2007 ONCA 491 |
| 8 | *Catanzaro v. Kellogg's Canada Inc.*, 2014 ONSC 5691, aff'd 2015 ONCA 779 |
| 9 | *Gregory v. Gill*, 2016 ONSC 4227 |
| 10 | *Garland v. Consumers' Gas Co.*, 2004 SCC 25 |
| 11 | *Champlain Ready-Mixed Concrete v. Beaupre*, 1971 CarswellOnt 790 (CA) |

**SCHEDULE "B"**
**RELEVANT STATUTES**

49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,

(a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no accepted offer to settle. R.R.O. 1990, Reg. 194, r. 49.09.

**SCHEDULE "C"**

**COMPARISON OF MONITOR'S JOINDER STATEMENTS TO PROOFS OF CLAIM AND BOOKS AND RECORDS**

**[REDACTED]**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., *et al.*

Court File No.: CV-17-11846-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**CONFIDENTIAL FACTUM OF THE MONITOR**
**(Returnable MAY 7, 2019)**

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